

INTEROFFICE MEMORANDUM

DATE: April 30, 2014 **PHONE:** (909) 387-8309

FROM: Simon R. Umscheid
Supervising Deputy District Attorney
San Bernardino Office



THRU: Mary Ashley
Chief Deputy District Attorney
Central Division

TO: Gary Roth
Assistant District Attorney-Criminal Operations

SUBJECT: **Fatal Officer Involved Shooting:**

Involved Deputies: Sheriff's Deputy Ismael Diaz
Sheriff's Deputy Joseph Perea

Involved Subject: Merlin Michael Factor (DOB: 6/18/87) of Redlands

Date and Time of Incident: June 29, 2013, 4:28 pm

Location of Incident: 34000 block of Yucaipa Blvd., Yucaipa, CA 92399

Investigating Agency: San Bernardino County Sheriff's Specialized
Investigation Division, Homicide Unit;

Agency Report Numbers: San Bernardino County Sheriff's Case # DR
141302397/ H# 2013-056

STAR Number: San Bernardino County District Attorney Star #13-
45054

STATEMENT OF FACTS

The following statement of facts is derived from interviews of the involved parties and other information and evidence as gathered by the San Bernardino County Sheriff's Specialized Investigation Division, Homicide Unit, during the course of their investigation.

SUMMARY

On June 29, 2013 at about 3:02 pm Sheriff's Dispatch received a call of a possible vandalism that had occurred at a residence on the 12000 block of Second Street in Yucaipa. The reporting party, Ben D., informed dispatch that a subject he knew as Merlin Factor had thrown a rock through the front window of his residence. He identified the subject by name and that the subject had fled on foot towards Second Street.

Deputy Ismael Diaz responded to the call and attempted to locate the named suspect. While enroute, there was another dispatch of a disturbance occurring in the area of Third Street and Yucaipa Blvd. That call indicated that there was a male and a female engaged in a domestic disturbance. At 4:28 pm there was an anonymous call from a female asking that deputies hurry to Third Street and Yucaipa Blvd. The call was disconnected by the caller. An attempt to reconnect with the caller was unsuccessful.

Ben D., the initial reporting party, recontacted the Sheriff's Dispatch and reported that his girlfriend had left the location to pick up Factor. Sheriff's Dispatch believed that the earlier vandalism call and the other calls were possibly related given their close proximity to each other. Deputy Diaz and Deputy Joseph Perea were both dispatched to the area and began conducting an area check. The dispatch included a possible description of a green Chevrolet Malibu.

While conducting the area check, Deputy Diaz contacted individuals at a car wash located at Third Street and Yucaipa Blvd. No one at that location had witnessed anything that suggested someone was in the need of help. Deputy Diaz did contact an individual he saw jump a fence in the area. That individual was found not to match Factor's description.

As Deputy Diaz crossed the intersection of Third Street and Yucaipa Blvd., he saw a green car parked next to the Der Wienerschnitzel restaurant. The deputy made a u-turn in order to attempt contact. As he turned around and headed back towards the vehicle's location he saw the vehicle pull out onto Yucaipa Blvd. The vehicle headed west on Yucaipa Blvd. passing the deputy. As the vehicle passed, the deputy saw that the female driver appeared to have a fearful look on her face. Seeing that the

vehicle matched the description given by dispatch, the deputy turned around again to follow the vehicle.

Deputy Diaz radioed Deputy Perea that he thought he had spotted the vehicle. Deputy Diaz turned on his overhead lights and initiated a traffic stop. The car, being driven by Erin H., did not hesitate to pull over. The vehicle pulled into a church parking lot at 34784 Yucaipa Blvd. Diaz pulled his unit into the parking lot and parked next to the passenger side of the vehicle. Perea pulled in and parked parallel to the driver's side of the vehicle. Diaz had pulled up by the side of car due to a concern that Factor may try and run.

Diaz exited his unit and approached the front passenger door. He made contact with the passenger, later determined to be Factor. Factor provided the name of John Harper. Diaz opened the car door and intended to handcuff Factor based on him matching the suspect description. As he opened the door, Factor put his foot outside the door. Diaz attempted to grab hold of Factor's arm to handcuff him. Diaz attempted to turn Factor towards the car so he could handcuff him as he exited the car.

Factor immediately pulled away from Diaz. Factor turned towards Diaz and grabbed his shirt. Diaz gave multiple commands for Diaz to stop resisting him. Factor and Diaz stood facing each other between the car and car door. As he continued to grab Diaz's shirt, he tore it and caused Diaz's nametag to fall to the ground. Deputy Diaz was fearful at this point that Factor was going to engage him in a fight.

Diaz pushed Factor away from him and causing him to fall back into the car. Factor then reached back towards Diaz grabbing the deputy around the waist. According to Deputy Diaz, he could feel Factor's left hand on his holster which contained his firearm. As Factor grabbed at the holster Deputy Perea said "He has a gun." As he and Factor continued to struggle, Perea yelled "Gun, gun, gun."

Deputy Perea deployed his Taser as Diaz tried to push Factor off of him. He managed to push Factor off of him and Factor fell back into the vehicle. Factor appeared to be reaching into his pants as fell back into the car. It appeared to the deputies that the Taser was ineffective because Factor continued to talk at the deputies. Diaz was concerned because Factor appeared to be reaching well down in to his pants. He was concerned that he possibly was trying to grab ahold of a weapon. Factor was stretching out at his torso as if he was trying to reach something deep inside his pants.

Perea deployed his Taser a second time at Factor. Perea saw that the probes had hit Factor but it appeared to be ineffective because Factor continued to reach inside his pants as if he was trying to get ahold of something. Diaz ordered Factor to show his hands several times. He told Factor if he didn't show his hands the deputy was going to shoot him.

Diaz feared that he would have no route of escape if Factor produced a gun because of the car door and the positioning of the two police units. Factor continued to ignore orders to show his hands. Fearing that Factor was obtaining a weapon from his pants, Perea fired his weapon at Factor multiple times. Diaz indicated to investigators that Factor continued to reach into his pants even after being shot. Diaz noticed that Factor had been shot. He thought that Perea had fired 4-5 times. Deputy Perea initially told investigators that he had fired his weapon about 10 times. Diaz did not remove his firearm during the incident.

After Factor stopped moving, Diaz pulled him from the car and called for an ambulance. Perea started CPR on Factor. After an ambulance arrived on scene, a knife was found in Factor's left front pocket. Diaz told detectives that he thought that Factor was going to attempt to injure or kill him. He had pushed Factor down into the car believing that Factor had gained control over his firearm.

Erin H., the driver of the vehicle, was interviewed by investigators. She had dated Factor for a period of about two to three weeks during her separation from Ben D. She said that Factor suffered from a methamphetamine addiction that caused severe mood swings and paranoia. During the two weeks they dated, she stated that he had assaulted her on one occasion and stolen from her on another.

On the date of the incident she had agreed to give Factor a ride and had instructed Ben D. to call the police so that they would stop them and he would be arrested. She told investigators that she was afraid of Factor and had tried to get patrons at a gas station to call 911 after they had engaged in a loud argument in the parking lot. She was anxious to attract law enforcement's attention on the evening of the incident because of Factor's mood swings and her fear of further violence.

After she had picked up Factor they stopped at Del Taco on Yucaipa Blvd between Second and Third Streets. While Factor had gone inside of Del Taco to get a drink Erin H. called 911 and reported she was with Factor and that he had warrants. As Factor came back to the car Erin H. hid her phone under her leg which disconnected the call.

Upon returning to the car, Factor continued to yell at Erin H. As they pulled out onto Yucaipa Blvd, Factor told her, "Careful, people get killed for not paying up." It was at this point that she saw the police car pass them on the street. She told investigators that both she and Factor saw the police unit turn around and get behind them. Erin H. told investigators that when Factor saw the police unity he panicked and told her to "Go, go, go."

Erin H. then saw that there were two police units behind them with their lights on. Despite Factor's protests, she pulled into the church parking lot and stopped. She indicated she picked the lot because she felt Factor might flee and the open lot would

give officers a better chance to catch him if he did decide to run. As officers approached the car, Factor told Erin H., "Shit, oh shit I got police everywhere."

Erin H. knew that Factor generally carried a couple knives on him but didn't see him with any weapons at the time the deputies approached the car. She confirmed that when asked, Factor gave the name of "John Harper." She knew that John Harper was actually a friend of Factor's younger brother.

Erin H.'s description of the encounter itself was consistent with the deputies' accounts. It is also consistent with the recording from the deputies' belt recordings. She confirmed that Factor did pull away from the deputy and that he was ordered to stop resisting multiple times. She also heard the multiple clicks of what she assumed was the Taser being deployed. At this point Erin H. exited the car. As she did she heard multiple popping noises that she initially didn't recognize as gunshots. She estimated that she heard 5 gunshots.

Factor was transported to the emergency room of Redlands Community Hospital where he was declared dead. The autopsy revealed that Factor had been shot multiple times. Nine projectiles and bullet fragments were recovered during the autopsy. Lab reports confirm that Factor did have alcohol, methamphetamine and cannabinoids in his system at the time of death.

SUMMARY OF DEPUTY **JOSEPH PEREA'S INTERVIEW**

Deputy Joseph Perea was interviewed by Detective G. Hart of the San Bernardino County Sheriff's Homicide Detail. The interview took place on June 30, 2013 in the conference room at the Yucaipa Sheriff's Station. Present during the interview with Detective Hart and Deputy Perea were Detectives Davenport and Castillo.

Deputy Perea told the detectives that he had been employed as a Deputy Sheriff since 1996. He had been assigned to the Patrol Division of the Yucaipa Station for about 5 years. On the date of the incident Perea was in his short sleeve Class A uniform armed with a Glock 30, .45 caliber handgun with 13 round magazine and 1 round in the chamber. He was assigned to drive a marked Crown Victoria Unit, Roof #14-9.

Deputy Perea stated he was on patrol between 4:50 and 5:00 pm when he received a dispatch to a suspicious circumstances call in the area of Yucaipa Blvd and Third Street in Yucaipa. A female had called and requested that the police be sent. Dispatch believed the call was related to the one already responded to be Deputy Diaz. Dispatch wanted to cancel Perea's response and allow Diaz to handle it, but Perea decided to stay on the call. The dispatch included that it was a possible

vandalism and that the suspect vehicle was green. The call also contained information that the subject may be a runner.

Perea heard Deputy Diaz broadcast that he saw a green vehicle in front of the Kopper Kettle Kafe on Yucaipa Blvd. Perea spotted the vehicle and saw that there was a female and a male in the vehicle. The female looked "frantic" in Deputy Perea's words. He also stated that she appeared to see his police unit and appeared to be relieved. Perea broadcasted that he saw the vehicle exit the driveway and turn westbound on Yucaipa Blvd.

Once Perea had allowed traffic to pass, he pulled out to get behind the vehicle. He noticed that Deputy Diaz had already positioned himself behind the vehicle. Deputy Diaz had already initiated an attempt to stop the vehicle by turning on his police cruiser overhead lights. The vehicle pulled into a church parking lot. Deputy Perea told the investigators he was not sure where Diaz's vehicle stopped in relation to the green vehicle but he believed it was behind it. Perea pulled up next to the passenger side of the green vehicle in case the passenger decided to get out and run.

Perea got out and saw that Deputy Diaz was already in contact with the subject. They were both standing in the area between the green vehicle and the green vehicle's open front passenger door. The subject, later determined to be Factor, was pulling on the front of Diaz's uniform. Perea stated that Diaz and Factor both were grabbing onto each other and Diaz was telling Factor to "stop resisting." Factor was saying "I'm not resisting." It appeared to Perea however that Factor was fighting with Diaz.

Perea stated he was concerned that Factor was trying to get a weapon from Diaz. Perea then removed his Taser from its holster. He moved to the side of the suspect and tased the subject in the chest area. Perea stated that he heard the Taser was activated but it seemed to get no response from Factor. According to Perea, Factor continued to resist Diaz. Perea believed at this point that maybe the Taser had not connected with Factor.

Perea then discharged the Taser a second time, hitting the subject in the back. This time the Taser had an impact on Factor causing him to curl up with his hands near his waist area. At this point Perea said he heard a male voice say "gun" although he was unsure who said it. He heard Deputy Diaz say that he was "going to shoot you" to Factor. Factor appeared to still be actively resisting Deputy Diaz.

Perea described that Factor appeared to start "frantically dig in his waistband." According to Deputy Perea it appeared that Factor was "digging hard" and "trying to pull whatever he had on him out." Perea believed he was trying to retrieve a weapon, possibly a gun. Perea placed his Taser on the roof of the car and drew his sidearm. Meanwhile Diaz was repeating that he was going to shoot the subject if he didn't stop resisting.

Fearing that Factor was obtaining a gun from his pants, Perea fired his handgun at Factor. Deputy Perea was about three feet away by his estimation when he fired the first 3-4 shots at the suspect who was still trying to get something from inside his pants. According to Perea, the shots didn't seem to have any impact because it appeared that the suspect continued to reach into his pants. Perea continued to fire at the suspect until he stopped reaching into his pants. Perea estimated that he fired approximately 10 rounds.

Perea told investigators that he reloaded a full magazine into the gun in case Factor continued to present a threat. Perea believed that Diaz backed up as the shots were fired. After the shots were fired Diaz pulled Factor from the car onto the ground. When Factor was turned over he was nonresponsive and at that point Perea believed that he was likely deceased.

The female had exited the car during the confrontation. Not knowing her status in the situation she was handcuffed. Perea noted that she was upset at what had happened but also appeared to be thankful that it was over. Deputy Perea placed her handcuffed into the back of his patrol unit.

Perea began chest compressions on Factor based on the fact he possibly saw a sign of life as Factor gasped for air. He was unable to find a pulse or see signs of breathing so he discontinued the CPR. Medical arrived on scene and began attending to Factor. Perea unhandcuffed him at the request of medical. Medical personnel cut off Factor's clothing to begin possible treatment. It was at this time that Deputy Perea noticed a folding knife on the ground near Factor's waistband. Perea was unaware if the knife had fallen when they were cutting of his clothing. Deputy Diaz recovered the knife.

Factor was transported by medical personnel to the hospital. Perea indicated to the interviewing investigators that the vehicles, including the suspect vehicle and the patrol units, were not moved and were in the same positions when investigators arrived.

Deputy Perea explained that the reason he felt as if he had to deploy his Taser initially was to stop the suspect from fighting with Deputy Diaz. After Diaz was able to separate from Factor, Factor kept reaching into his pants. Perea stated he was "scared to death" that Factor was reaching for a gun and was going to injure him, Deputy Diaz or the female. He felt that Factor was intending to kill or seriously injure them to get away.

SUMMARY OF
DEPUTY ISMAEL DIAZ'S INTERVIEW

Deputy Diaz was interviewed by Detective Gary Hart and Detective Gerald Davenport. The interview took place on June 29, 2013 at the Yucaipa Sheriff's Station. Deputy Diaz has been a Deputy Sheriff for seven years and had been assigned to patrol since 2008 at the time of the shooting in this case.

On the date of the incident Deputy Diaz was in his Class A uniform and armed with a Glock 21 handgun. He also had a backup weapon in an ankle holster; a Glock 30 handgun. On the June 29, 2103, the date of the shooting, he did not have a partner and was alone in his patrol vehicle. He did not fire his weapon during the incident and received minor injuries to his left elbow.

On the date of the shooting at about 4:00 pm Deputy Diaz responded to 12941 2nd Street in Yucaipa. At that time and location the reporting party Ben D. reported that a subject named Merlin Factor had thrown a rock through his residence front window and then fled the area. Ben D. went on to tell Deputy Diaz that Factor had a history of violence. Several days earlier, according to Ben D., Factor broke down the door to Ben D.'s mobile home and beat up Erin H. Erin H. had dated Factor for a short period of time after Ben D. and Erin H. had broken up.

Ben D. went on state that Factor would come to the home to intimidate Erin H. Ben D. told Deputy Diaz the Factor allegedly knew when he (Ben D.) was at work. Factor then would come over to the residence and throw rocks or verbally harass Erin H. He provided a description of Factor to Deputy Diaz. He also claimed that Factor had numerous warrants and would hide from law enforcement in a drainage area.

Deputy Diaz asked Ben D. where Erin H. was currently. He told Diaz that she had left to pick up Factor. He told Diaz that it was Erin H.'s plan to drive Factor back towards the area and then attempt to get law enforcement's attention in order to have them contact Factor. Erin H. had come up with the plan in hopes of getting Factor into custody so he would stop harassing her. Ben D. gave a description of her car; an older model green Malibu. Diaz assured Ben D. he would attempt to locate Factor and Erin H.

Diaz left the mobile home park and drove south on 2nd Street. He then heard a dispatch of a 911 call. The dispatch relayed that there was a woman screaming in the call before it disconnected. The call originated at Yucaipa Blvd and 3rd Street. Deputy Diaz believed it could be related to the vandalism call at the residence.

Diaz made a u-turn and headed north on 2nd Street. As he drove he checked the parking lots of business looking for someone flagging down help. He made contact with several people in the area but nobody indicated that had seen anyone in distress. Deputy Diaz kept in contact with dispatch and Deputy Perea as he

continued to search the area for Factor and Erin H.

As Diaz crossed the intersection of 3rd Street and Yucaipa Blvd, he spotted the green car next to Der Weinerschnizel. Deputy Diaz made a u-turn and drove back towards the vehicle. He then saw the vehicle pull out onto Yucaipa Blvd. from the parking lot. As he passed the car, Diaz saw the female driving the car had a fearful look on her face. Deputy Diaz radioed to Perea that he had located the car.

Diaz made a u-turn and positioned his vehicle behind the green car. He initiated a traffic stop by utilizing his overhead lights. The car immediately pulled into a church parking lot and stopped. Diaz pulled up parallel to the passenger side of the green vehicle. Perea then pulled up parallel to the driver's side of the car.

As Diaz approached the car he asked the passenger (Factor) what his name was. He responded that it was John Harper. Deputy Diaz recognized that the subject fit the description of Factor. Deputy Diaz opened the front passenger with the intent of handcuffing Factor. Factor put his foot out of the car and attempted to stand up. Diaz grabbed Factor's arm. As Factor exited the car, Diaz attempted to turn Factor's body towards the vehicle so he could handcuff him. Factor pulled away from Diaz and turned back towards Diaz. Factor then grabbed Diaz 'shirt. Diaz told Factor to stop resisting him.

Factor and Diaz struggled within the door area of the car. Factor tore Diaz's uniform shirt causing Diaz's name tag to fall to the ground. As Factor continued to resist Diaz, Diaz continued to order him to stop. Diaz told investigators that he could tell that Factor was intent on fighting him based on his resistance and failure to comply with multiple orders. Diaz pushed Factor back towards the vehicle causing Factor to fall back into the car. Factor then lunged back at Diaz and grabbed Diaz around his waist. Diaz became immediately concerned because he could feel Factor's left hand on his gun holster.

As Factor grabbed at his gun, Diaz heard Perea say "he has a gun." Diaz and Factor continued to struggle as Perea yelled "gun, gun, gun." According to Diaz, Perea then deployed his Taser at Factor as Diaz pushed Factor back a second time. When the Taser was deployed, Factor was on the seat of the car and had his hands inside of his waistband. Diaz believed that the Taser was ineffective based on the fact that Factor kept on talking. Diaz told investigators that he couldn't remember what Factor was saying be he had kept talking despite the Taser being deployed. Diaz believed that Factor was attempting to reach something, perhaps a gun, that was deep inside his pants. It appeared to Diaz that Factor was stretching out on the front seat of the car in order to reach down into his pants. As Factor was doing this, Perea deployed his Taser a second time. Diaz thought that the Taser probes had hit Factor, but was not effective because Factor continued to reach into his waistband area. Diaz kept ordering Factor to show him his hands or he was going to have to shoot him.

Diaz was concerned that he would have no route of escape if Factor produced a gun and started firing. Because of the position of the confrontation in the car and the placing of the police unit he feared he would not be able to get out of harm's way. Factor continued to disregard Diaz's order to stop reaching in his waistband and show his hands. As Factor continued to disregard Diaz's commands, Deputy Perea opened fire on factor with his weapon.

Diaz told investigators that Factor continued to reach into his waistband as the shots were being fired. Diaz stated that he thought he heard 4-5 shots. Diaz did not unholster or fire his weapon at Factor. After Factor stopped moving, Diaz pulled him from the car and called for an ambulance. Perea started CPR on Factor. Diaz indicated that he also located a knife in Factor's left front pocket.

Diaz stated that he feared for his safety initially because Factor had grabbed him and he thought had gotten control over his firearm.

SUMMARY OF ERIN H.'S INTERVIEW

Civilian witness Erin H. was interviewed at the Yucaipa Sheriff's Station by Detective Gerald Davenport. The interview was conducted on June 29, 2103 at about 10:24 PM.

Erin H. lived with her boyfriend Ben D. in Yucaipa. Approximately two months prior to the shooting, Erin H. and Ben D. had been separated for a period of about 2-3 weeks. It was during this time that Erin H. had met and dated Factor briefly. The relationship was brief and ended, according to Erin H., because Factor abused methamphetamine and was subject to severe mood swings. Factor had acted extremely paranoid and had accused Erin H. and others of "trying to set him up." She knew that Factor had several warrants and had stolen from a number of people.

During the couple of weeks they dated, Factor had entered her home and stolen some of her belongings including her ATM card, electronic equipment, cash and prescription pills. Erin H. also stated that Factor had been violent towards her. He had punched her in the face and punched holes in the walls of her residence. Despite suffering a black eye from the incident, she did not report it to police.

A couple days prior to the shooting, Factor had come over Erin H.'s residence and let himself into the house. When she awoke he was sitting watching her. He assaulted her when she woke up. Her daughter had to run to a neighbor's house for help. Erin H. showed the interviewing detective the bruises on her arms and legs from the assault. That incident had been reported to the Yucaipa Sheriff Station.

Erin H. indicated she was afraid of Factor because of mood swings and physical assaults on her. According to Erin H., Factor knew that Ben D. worked nights leaving her and her daughter home alone. Factor would come over to the residence and stand outside shouting obscenities, throwing rocks and vandalizing her property.

On the date of the shooting, Factor showed up at Erin's house at about 2:15 pm. Erin H. told Factor he had to leave. Factor claimed that Erin H. owed him money and he demanded she give it to him. After he was told to leave Factor picked up a large rock and threw it through the residence's front window. Factor then fled the area. Shortly thereafter he called Erin H. and asked for a ride to Calimesa. He denied the rock throwing incident.

Factor called a second time. She agreed to give him a ride as cover to try and get him arrested. She agreed to pick him up in front of the adult continuation school on Third Street. After she hung up with Factor she told Ben D. to call the police and notify them of her meeting with him and where she would be located.

Erin H. eventually met up with Factor at Fourth and Wildwood Canyon Road. Factor made Erin H. take out the SIM card out of her cell phone so the police couldn't track their movement using GPS. Factor continued to demand money from Erin H. She eventually agreed to give him some money because she was afraid of what he would do. He told her to go to the ATM at the market. She stated she would take them to Walgreens to buy a drink and cigarettes. She told investigators that her plan was to make a scene at the store hoping someone would call police.

Despite getting into a loud argument inside the store it didn't appear to her that anyone had called the police. She even asked a man in the parking lot to call 911; according to Erin H. he just looked at her. As they left Walgreens they turned right onto Yucaipa Blvd. Factor continued to yell obscenities at Erin H. He continued to make threats against her.

She then agreed to stop at a gas station to buy him something to drink. At the gas station a subject approached Erin H. and asked if she needed help. Factor then walked away from the car. He threatened to burn down her house as he left. She told other customers to please call 911. She then got back in the car and drove across Yucaipa Blvd and told Factor to get back into the car.

She convinced him to get back into the car by saying the police had been called to Walgreens. He got back into the car. They began to argue again. As they drove westbound on Yucaipa Blvd., Erin H. saw a Sheriff's unit pass them. She then saw the police car turn around and get behind their vehicle. Factor told her that, "Careful, people get killed for not paying up."

She told the detective that once Factor realized that the police were attempting to get behind them, he told her, "Shit, go, go, go." At this point she saw that two police cars

were behind her and had activated their emergency lights. Despite Factor's requests to continue on to a car wash parking lot, she pulled into the church parking lot. She told the investigators that she wanted to make sure the deputies were able to catch Factor because she felt that he would try and flee.

Two deputy units pulled up next to the car. Two deputies emerged and approached the passenger side of the car. She stated that both her and Factor knew that they were Sheriff Deputies. Factor unbuckled his seatbelt and told Erin H., "Shit, oh shit I got police everywhere." Although she did not see Factor with any weapons she knew that he routinely carried a couple of knives on his persons. She indicated that Factor did not produce either knife while law enforcement was approaching him.

Factor's window was down. When the deputies asked for his name he gave the false name of John Harper. She knew that Harper was a friend of Factor's brother. One of the deputies opened the car door. Factor pushed the door open at the same time and stepped out of the car. The deputies attempted to turn Factor around and handcuff him from behind. Erin H. told the investigators that Factor was not cooperative and heard him grunting. She heard the deputies repeatedly tell him to "Quit resisting." She also heard Factor say that he was not resisting.

She described Factor as struggling with deputies and said that 'it was not like he was going easy.' She told investigators that Factor was not violent with the deputies but that he did pull away from them. She heard one of the deputies warn Factor that he was going to get tased if he didn't stop resisting. The deputies again warned Factor to stop resisting. Erin H. then described a clicking noise that she heard which she thought was the Taser being used. She saw Factor shaking and heard him say he couldn't breathe. Erin H. grabbed her purse and exited the car as she heard multiple popping sounds. She indicated that she initially didn't recognize them as gunshots.

After the shooting she heard one of the deputies perform CPR and the other called for an ambulance. Erin H. told investigators that she had never seen Factor with guns. She told investigators that the small knife that was found in the car was hers. However, she did not know why the knife's blade was open and exposed.

SUMMARY OF INTERVIEW OF **WITNESS BENJAMIN D.**

Benjamin D. was in a dating relationship with Erin H. and lived with Erin H. He was interviewed by Detective G. Hart at the Yucaipa Sheriff Station on June 29, 2013 at 8:56 pm. Factor had "moved in" on Erin H. while Ben D. and she had a couple week break from their relationship. He described Factor as constantly coming over and causing problems. He would come over and yell obscenities at Erin H. from outside the residence.

Factor would show up at the residence on a daily basis and throw things at the residence. He would claim he had property inside the residence .On the date of the shooting Factor had come over to the residence and demanded \$20 from Erin H. Erin H. had told Factor to leave and made a comment about “kicking his ass.” Factor then went around side of residence and threw a large rock through the kitchen window. Factor then fled the scene on foot.

After the rock throwing incident Factor called and argued with Erin H. and demanded a ride somewhere. Erin H. came up with a plan in which she agreed to give Factor a ride and then would try and attract attention from law enforcement in hopes of getting Factor arrested on his warrants.

SUMMARY OF INTERVIEW OF
WITNESS ROBERT R.

Robert R. was interviewed by Detective Bachman at the witness' residence on June 30, 2013. Robert R. is a law enforcement officer and was off duty at the time of the incident. He was with his wife at a gas station on the corner of Yucaipa and 3rd Street. He noticed that deputies seemed to be circling around in the area. Based on his training and experience he thought they were probably looking for someone. As they pulled out of the gas station parking lot he observed that the deputies were involved in a traffic stop in the church parking lot.

He did not see the stop take place but saw the deputy and the subject fighting. He could hear the deputy yelling “Stop resisting.” He saw that there was a second deputy that arrived on scene as the first deputy made contact with the subject. Robert R. pulled into the lot with the intent of providing assistance since he was an off duty officer. As he pulled around the bank he then saw both deputies with weapons drawn at the subject.

He then heard about 8-10 shots fired in rapid succession but was not able to tell if there were multiple guns being fired. He saw one of the deputies then detain the female occupant while the other attempted to give CPR to the subject. Robert R. directed traffic around the scene until additional Sheriff Units arrived. He then provided his identification before leaving the scene. Robert R. believed that the deputies acted appropriately based on what he saw.

SUMMARY OF INTWERVIEW OF
WITNESSSS MICHAEL B.

Michael B. was interviewed by Detective Bachman in his detective unit on June 30, 2103 at about 3:22 pm. Michael B. relayed that on the day before at about 4:00 pm he was at a bicycle store on Yucaipa Blvd. east of Third Street. At the location he

saw a car stopped with a female and male subject. The male subject was yelling and cussing at the female.

He saw the subjects get into their vehicle and exit the parking lot. He then saw a Sheriff's unit turn around and get behind the vehicle. He then saw the car pull into the church parking. He saw the deputies struggle with the male subject. He heard the deputies yelling at the male subject to either get down or get out. Michael also heard what he thought was a Taser going off.

He then heard about 7-9 gunshots. He saw one of the deputies administer CPR to the subject. Michael B. told investigators that he saw the subject actively resist the deputies. He believed that the subject must have been armed based on what he saw.

SUMMARY OF WTNESS INTERVIEW OF FREDERICK L.

Frederick L. was interviewed on June 29, 2013 at 8:05 pm at the scene. He was on the southwest side of the First Baptist Church under the shade of a tree. He saw the Sheriff's unit pull in behind a green vehicle in the church parking lot. He could tell by the lights and siren that the Sheriff Deputy was conducting a traffic stop of the green vehicle.

He saw a male subject exit the green car and face the Sheriff Deputy. The deputy attempted to grab the subject's wrist. The subject then resisted the deputy by turning away from the deputy and reentering the car. He heard the deputy tell the subject "Don't resist." The deputy was not able to regain control of the subject before reentering the car. He couldn't tell because of the angle if the subject put his legs back into the car.

The witness then saw that there were two deputies reaching into the car. Because of his view being blocked by the bodies of the deputies he could not see what the subject was doing. It appeared to the witness that the deputies were attempting to regain control over the subject.

Frederick L. saw a female exit the green vehicle as he heard a noise he thought was the deployment of a Taser. The witness didn't think that the subject was resisting defiantly but stated that the deputies "know more than I do." He then heard the subject say "no guns." He wasn't sure if the subject meant he didn't have a gun or if he was telling the deputies there was no need to take out their guns.

He heard one of the deputies say to the subject "Don't resist, I will shoot you." He then heard 6-7 gunshots. He estimated that the struggle last a total of 30 seconds to a minute. The witness thought the shooting was excessive based on the fact he

believed that the first deputy could have taken the subject to the ground and handcuffed him.

Detective Avila walked with the witness to the location he was at the time of the incident. Based on the location and the angle the witness would have only seen the back of the deputies and the upper portions of their bodies.

SUMMARY OF WITNESS
INTERVIEW OF NERY C.

Nery. C. was interviewed by Detective Avila at the Yucaipa Car Wash on June 30, 2013. Nery C. was employed at the car wash and was working at the time of the incident. Nery C. relayed the same general information about the initiation of the traffic stop in the church parking lot. He indicated he was about 50 yards from where the shooting occurred.

He indicated that he saw the two deputies approach the car. Both appeared to have an object in their hands but couldn't say whether it was a gun, a Taser or something else. The deputies ordered the subject out of the car after opening the passenger side door. The first deputy appeared to pull on the subject by the arm. The subject resisted and said "No, I am not getting out." The subject kept pulling away and repeating he wasn't getting out.

The second deputy unholstered his gun and told the subject he was going to shoot. He heard the deputy say this as the subject continued to resist being pulled from the car. The witness stated that he heard approximately 8 shots, all in rapid succession. After the shots, the subject was pulled from the car. He estimated that the incident lasted about a minute and that medical aid was there within 30 seconds. The witness told investigators that he never saw the subject with a knife or a gun.

SUMMARY OF WITNESS
INTERVIEW OF CASSANDRA H.

Cassandra H. was interviewed by Detective M. Avila on June 29, 2013 at the Yucaipa Sheriff Station. Cassandra H. is the sister to Merlin Factor. She lived in the same mobile home park as Factor and Erin H. She described Factor as having a severe methamphetamine problem which led him to act irrationally. She also described Erin H. as having problems also. She described their relationship as being very rocky. She indicated that Factor had become homeless and was living from "dope house to dope house."

AUTOPSY

The autopsy of Merlin Factor was conducted by Dr. Jennifer Park of the Riverside County Coroner on July 2, 2013 at 900 a.m. Detective Bachman from the San Bernardino County Sheriff was present.

Factor was found to have multiple gunshot wounds to his body. There were a total of nine gunshot wounds down the right side of his torso. Nine fired bullets/bullet fragments were removed from the body during the autopsy. The right atrium and ventricle to the heart, the esophagus, stomach, small intestine, both lungs, liver, spleen and right kidney all suffered bullet path lacerations. Dr. Park noted that none of the entrance wounds had stippling or muzzle imprints. All of the projectiles traveled in a right to left direction. She also noted that the respective wound paths crossed making identification of the individual wound paths impossible.

Toxicology results indicate that Merlin Factor was positive for Methamphetamine, ethyl alcohol, and cannabinoids.

Dr. Park determined the cause of death to be multiple gunshot wounds with death likely occurring within seconds.

STATEMENT OF APPLICABLE LAW

Self-Defense and Defense of Another

It is lawful to use force against another person if a person reasonably believes there was imminent danger of bodily injury to himself or someone else. The person must reasonably believe that the immediate use of force was necessary to defend against that danger. That person is only entitled to use that amount of force that a reasonable person would believe is necessary in the same situation.

In deciding whether the person's beliefs were reasonable, all the circumstances as they were known to and appeared to that person should be considered as well as what a reasonable person in a similar situation with similar knowledge would have believed. If the person's beliefs were reasonable, the danger does not need to have actually existed.

CALCRIM 3470.

Self-Defense - Assailed person need not retreat

An assailed person is not required to retreat. He is entitled to stand his ground and defend himself and, if reasonably necessary, to pursue an assailant until the danger

of bodily injury has passed. This is so even if safety could have been achieved by retreating.

CALCRIM 3470

Any police officer who has reasonable cause to believe that a person to be arrested has committed a public offense may use reasonable force to affect the arrest. A police officer who makes or attempts to make an arrest need not retreat or desist from his efforts by reason of the resistance of the person being arrested nor shall the officer lose his right to self-defense by the use of reasonable force to effect the arrest. (**Penal Code section 835a.**)

The reasonableness of the particular use of force must be judged from the perspective of a reasonable officer on the scene rather than with 20/20 vision of hindsight. Police officers are often forced to make quick decisions in circumstances that are tense, uncertain and rapidly evolving. Certain factors are to be considered. Such as: severity of the crime, whether the suspect poses an immediate threat to safety, and whether he is actively resisting. (**Graham v. Conner (1989) 490 U.S. 386.**)

ANALYSIS

The deputies in this case had reason to believe that the unidentified female (later identified as Erin H.) may have been in some danger based on the calls to the Sheriff Station in Yucaipa. Initially there was a call of vandalism and then a call of a domestic dispute. There was an anonymous call from a female asking for deputies to hurry to the location. The vehicle that was spotted by the deputy matched the description and the deputy stated that the female appeared to be in peril based on her expression. The deputy had a legal right to conduct a traffic stop and investigate to determine if a crime had been committed and/or if the female was in danger.

The deputy contacted Factor and attempted to detain him. Factor immediately attempted to pull away. Despite orders to comply he resisted by grabbing at the deputy resulting in a torn uniform. Factor, due to his position while grabbing the deputy, was pulling down on the deputy's gun. After being shoved back into the car, Factor continued to "furiously" reach into his waistband. He ignored multiple commands to stop. Those commands were heard by multiple witnesses. Deputy Perea initially utilized a nonlethal method of attempting to stop Factor from reaching into his pants. Despite being Tased, Factor continued to act as if he was reaching for a weapon. Both deputies involved in the incident stated that they felt that Factor was attempting to retrieve a weapon hidden in his pants. Deputy Perea believed that they were in immediate danger of being shot by Factor, and when the Taser couldn't stop Factor, Deputy Perea fired his handgun.

CONCLUSION

Based on the reasonable fear created by Factor grabbing the deputy around the waist, and continuing to grab in his own waistband, ignoring commands to stop, Deputy Perea was legally justified, under the laws of self-defense and defense of others, in using lethal force to defend himself and Deputy Diaz. As a result, no criminal liability exists on the part of Deputy Perea or Deputy Diaz.

Respectfully Submitted,

MICHAEL A. RAMOS
District Attorney

By _____ Dated: _____
Simon R. Umscheid
Supervising Deputy District Attorney

Reviewed by:

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